Yellow Freight System, Inc. ***and*** **Kim Burditt.** Case 26–CA–19502

May 28, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On December 5, 2000, Administrative Law Judge Keltner W. Locke issued the attached bench decision and certification. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

In adopting the judge's finding that deferral to the award of the arbitration panel is warranted, we find that the award is susceptible to an interpretation consistent with the Act and satisfies the standards for deferral set forth in *Olin Corp*., 268 NLRB 573 (1984), and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). More particularly, we find that the panel determined that Charging Party Burditt breached established safety procedures on August 17, 1999, by failing to notify supervision promptly of a potential chemical spill and by otherwise failing to follow established procedures pertaining to a potential hazard. In these circumstances, we find it unnecessary to rely on the judge's finding that the arbitration panel determined that conditions were not "abnormally dangerous."[1] Even assuming, arguendo, that Burditt was entitled to seek medical attention because of exposure to a hazardous material, the arbitration award is susceptible to an interpretation that Burditt failed to follow established safety procedures earlier that day and would have been properly disciplined, in any event, for that misconduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

Tamra Sikkink, Esq., for the General Counsel.
Gregory Grisham, Esq. and *Jeff Weintraub, Esq.*, of Memphis, Tennessee, for the Respondent.

[1] The arbitration panel made no finding on this issue one way or the other.

Mr. Kim Burditt, for the Charging Party.

BENCH DECISION AND CERTIFICATION

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on November 2, 3, and 6, 2000 in Memphis, Tennessee. Before the hearing opened, and again before the General Counsel presented evidence, Respondent moved for the Board to defer to an arbitral award and dismiss the complaint pursuant to its policy under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). After taking the motion under advisement, I received the General Counsel's evidence.

On November 6, 2000, after the General Counsel rested, both the General Counsel and Respondent presented oral argument on Respondent's motion. After considering those arguments, I concluded that deferral was warranted under the *Spielberg* and *Olin* precedents and issued a bench decision recommending that the complaint be dismissed.

In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as Appendix A, the portion of the transcript containing this decision.[1]

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Yellow Freight System, Inc, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the Union, Teamsters Local 667, has been a labor organization within the meaning of Section 2(5) of the Act.

3. Pursuant to the Board's precedent in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984), the allegations herein should be deferred to an arbitral award.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The complaint is dismissed.

APPENDIX A

BENCH DECISION

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This is a bench decision in the case of Yellow Freight System, Inc., which I will call the "Respondent," and Kim Burditt, an individual, whom I will call the "Charging Party." The case number is 26–CA–19502. This decision is issued pursuant to

[1] The bench decision appears in uncorrected form at pages 756 through 772 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification. Respondent's name appears in the case caption as amended at hearing.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

This case began on December 28, 1999, when the Charging Party filed its initial charge in this proceeding. After an investigation, the Regional Director of Region 26 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Respondent filed an Answer to the Complaint which admits certain allegations. Based upon these admissions, I find that the government has proven the allegations in Complaint paragraphs 1(a), 1(b), 2, 3(a), 3(b), 4, 6, 8(a) and 8(b). I conclude that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that Teamsters Local 667 (the "Union") has been a labor organization within the meaning of Section 2(5) of the Act.

The Complaint alleges that Respondent took disciplinary action against its employee, Kim Burditt, because he and another employee engaged in a concerted refusal to work because they reasonably believed that working conditions were unsafe. Initially, Respondent discharged Burditt, but later reduced this action to a six-day suspension without pay. Respondent did not discipline the other employee.

Respondent, citing *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), contends that this case should be deferred to an arbitral award upholding the disciplinary action. Whether to defer this case is a threshold issue which must be resolved before considering the present case on the merits.

Respondent asserts that Burditt filed a grievance regarding the disciplinary action taken against him, and that this grievance came before an arbitration panel established by the collective-bargaining agreement between Respondent and the Union. The panel denied the grievance.

Before deferring to an arbitral award, the Board requires certain conditions to be met. The arbitration proceeding must have been fair and regular, all parties must have agreed to be bound by the arbitral decision, and that decision must not be clearly repugnant to the purposes and policies of the Act. The Board uses the phrase "palpably wrong" to describe an arbitral award which is clearly repugnant to the purposes and policies of the Act.

Additionally, if the Board is to defer to an arbitral award, the arbitrator must have considered the unfair labor practice issue which is before the Board. See *Motor Convoy*, 303 NLRB 135 (1991).

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To determine whether an arbitrator has adequately considered the unfair labor practice issue, I must examine two factors: First, I must determine whether the contractual issue, decided by the arbitrator, is factually parallel to the unfair labor practice issue. Second, I must determine whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. If the record answers both of these questions affirmatively, then the arbitrator has adequately considered the unfair labor practice issue.

To find that an arbitral award is clearly repugnant to the Act, the Board must conclude that the award is not susceptible to an interpretation consistent with the Act. The party seeking to have the Board reject deferral bears the burden of proof.

In the present case, the record clearly establishes that the parties had agreed to be bound by the award of the arbitral panel, and the government does not dispute this conclusion. However, the General Counsel contends that the arbitral proceeding was not "fair and regular" because the panel based its decision on a finding which, the government asserts, is not supported by the arbitral record.

Before discussing the General Counsel's argument, the following background information will be helpful. The Respondent is a trucking company with a large facility at Memphis, Tennessee. At this facility, employees load and unload tractor-trailer trucks driven by other employees. The Union represents these employees, and Charging Party Burditt is a Union steward.

On the evening he was discharged, Burditt had become concerned that a poisonous chemical had spilled inside one of the trailers to be unloaded. Another employee, Patrick Couch, had notified Burditt of this situation, and both Burditt and Couch had entered the trailer briefly. Both believed that they smelled a chemical.

A little later, Burditt and Couch spoke with the shift operations manager, Tom Taylor, about this situation. Burditt suggested that they call 911, but Taylor said no, he wanted to call the owner of the chemicals being shipped in that particular trailer first. He wanted to find out what chemical had spilled.

Deciding to call 911 anyway, Burditt left Taylor's office, found a telephone, and did so. At some point, Burditt also told other employees to evacuate the loading dock, even though the shift operations manager had not told him to do so. The shift operations manager told Burditt to return to work, and gave him a written notice to do so.

Giving such a notice appears to have been a standard procedure. The notice allowed a 10-minute period before Burditt would be disciplined for failing to return to work. During that period, the notice stated, Burditt could seek the advice of a Union steward or business representative. After 10 minutes, Burditt still had not returned to work, and the shift operations manager decided to discharge him.

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The discharge letter given to Burditt five days afterwards stated that on August 17, 1999, Burditt had told employees on the loading dock to evacuate the dock because a poisonous chemical had spilled in one of the trailers to be unloaded. The letter also stated that when Burditt's supervisor told him to return to work, Burditt did not do so. It also noted that after Burditt's supervisor told him that he, the supervisor, would handle the situation, Burditt nonetheless called the fire department. The discharge letter continued as follows:

> You violated our posted "chemical spill evacuation procedures" by failing to notify the supervisor as posted. When you would not return to your work area, you were

given a warning letter saying you were refusing a direct order and that you had a ten minute cooling off period to reconsider. Two job stewards were instructed to discuss this issue with you. You did not return to work. The supervisor told steward Jonas Brown that you were being terminated.

The General Counsel argues that the arbitral panel did not base its decision, upholding this discipline, on any of the reasons given by Respondent for imposing the discipline. The arbitral panel gave only a brief explanation for its decision, and I will quote that explanation in its entirety:

> THE DECISION ON CASE NUMBER 61, IS BASED ON THE FACTS THAT K. BURDITT SHOULD HAVE GIVEN THE BILLS TO HIS SUPERVISOR, PER ARTICLE 16, SECTION 8, AND THE NMFA HEALTH AND SAFETY EMPLOYEE PROTECTION TRAINING PROGRAM. HE CLAIM OF THE UNION IS DENIED AND THE DISCHARGE LETTER IS REDUCED TO A SIX (6) DAY SUSPENSION, ALREADY SERVED. COST TO THE UNION. [Capitalization in original.]

The term "bills," as used by the arbitral panel, refers to bills of lading which identify the hazardous chemicals being transported in a particular trailer. The term "NMFA" refers to the National Master Freight Agreement, that is, the collective-bargaining agreement.

The General Counsel argues that the Respondent did not base its decision on any failure of Burditt to give the bills of lading to his supervisor. That is not one of the reasons listed in the discharge letter. The government contends that the arbitral proceeding cannot be considered fair and regular because the arbitral panel upheld the discipline on grounds other than those asserted by the Respondent as the basis for such discipline.

Although the Board will defer to an arbitral award only if that proceeding has been "fair and regular," I understand that requirement to entail a review of what might be termed "procedural due process," rather than a review of the logic of the arbitrator's result. The Board has a separate requirement pertaining to the substance of the arbitral decision, namely, that the decision not be "palpably wrong."

Incidentally, it should be noted that the Board only sits as a judge of the "rightness" or "wrongness" of an arbitral award to the extent of determining if the award is clearly repugnant to

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the purposes and policies of the Act. The Board could not fulfill its duty of enforcing the Act by deferring to an arbitral decision clearly contrary to the Act. Therefore, before deferring to an arbitral award, it is appropriate for the Board to make sure that the decision does not transgress the Act, and it is also appropriate for the Board to assure itself that the arbitration procedure satisfied standards of fairness. However, should I go more deeply into the arbitral process, I would be traveling down the path towards a de novo review of the arbitral award, which clearly would be inappropriate.

Through the negotiating process, the Respondent and Union have agreed on an arbitration process for interpreting and applying the terms of their collective-bargaining agreement. Recognizing that arbitral awards will give meaning and dimension to the agreements they reached at the bargaining table, the parties have placed their confidence in the particular arbitral process they fashioned. It would be as inappropriate for me to substitute my judgment for that of the arbitrator the parties have selected, as it would be for me to rewrite a term of the parties' collective bargaining agreement. Either action would substantially exceed my authority.

Therefore, in determining whether the arbitral award was "fair," I do not decide whether the result was "fair" in the sense that people typically use the word "fair" in the phrase "it's not fair." Rather, I use the term "fair" in the more limited sense of ascertaining whether the arbitral process was impartial and afforded the grievant an adequate opportunity to present evidence and be heard.

The record provides no basis for concluding that the arbitral process was unfair. Similarly, it provides no basis for concluding that this process was irregular. The party opposing deferral bears the burden of proving such unfairness or irregularity.

The General Counsel contends that the arbitral proceeding was not reliable because it did not consider sworn testimony but rather reached its decision based upon a documentary record. However, an arbitration does not have to meet the exacting standards of a trial conducted under the Federal Rules of Evidence. I do not conclude that the arbitral proceeding was unfair or irregular because the panel reached a decision based upon written evidence, which included a statement prepared by the grievant, Burditt.

The government bears the burden of demonstrating that the arbitral procedure was unfair or irregular. I find that the government has not met this burden. Additionally, I find that the record does not establish that the arbitral award was clearly repugnant to the Act.

To determine whether the arbitration panel considered the unfair labor practice issue, I begin by asking whether the issues raised by the Complaint in this case are factually parallel to the issues raised by the grievance. The Complaint alleges that the Respondent discriminated against Burditt because he and another employee engaged in a concerted refusal to work, because these two employees assisted the Union, and because they refused to work in good faith because of working conditions which were abnormally dangerous within the meaning of Section 502 of the Act.

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Burditt's grievance stated, in part, as follows: "On 08/17/99, there was a spill of 6.1 poison. As a Job Steward I was worried about the safety of the employees on the dock." I find that this grievance, which specifically referred to Burditt's role as a Union steward, raised the issue of discrimination against him because of his Union activities. The grievance specifically links Burditt's conduct with this Union position, and indicates that he took action because he was concerned about the safety of other employees.

Article 4 of the collective-bargaining agreement describes in detail the functions of a Union steward and limits the steward's authority to certain specified activities. This contractual provision includes the following language:

> Job stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Local Union.

Clearly, a Union can waive the rights of its bargaining unit employees to engage in protected concerted activities. A no-strike clause is the most obvious example.

The grievance links Burditt's activities with his position as Union steward. It therefore presented the arbitral panel with the issue of whether these activities fell within the protection of Article 4 of the collective-bargaining agreement.

Additionally, Article 21 of the collective-bargaining agreement, which is captioned "Union Activities," states, in pertinent part, as follows:

> Any employee, member of the Union, acting in any official capacity whatsoever shall not be discriminated against for his/her acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer's business, nor shall there be any discrimination against any employee because of Union membership or activities

Thus, the collective-bargaining agreement protected Burditt's right to engage in Union activities, both in his capacity as steward, and also in his role as an employee.

I conclude that these protections in the collective-bargaining agreement are substantially similar to the protections of the Act. Further, I find that the issues presented to the arbitral panel are factually parallel to the issues presented by the unfair labor practice charge.

In making these findings, I note the similarity of the facts considered by the arbitral panel to the facts developed by the General Counsel. Moreover, in this proceeding, the government did not present specific evidence of animus which would establish that Respondent bore hostility to the Union. To the contrary, the record shows a mature collective-bargaining relationship in which the Union and the Employer have developed and refined procedures for dealing with conflicts in the workplace.

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For example, Article 42 of the collective-bargaining agreement has established a procedure which management must follow in dealing with an employee who refuses a work order. This procedure involves the supervisor giving the employee a time-stamped letter informing the employee that after a 10-minute "cooling off period," he must return to work or be discharged. The letter also suggests that the employee contact a Union business agent or steward for advice.

Burditt received such a 10-minute letter. Significantly, the supervisor who gave Burditt the letter, rather than Burditt himself, contacted a Union steward and asked the steward to talk to Burditt. This action demonstrates an intent to follow the terms of the collective-bargaining agreement, and not an intent to subvert or circumvent the agreement. In other respects, the record does not reveal an environment in which hostility to a union would cause the unfair labor practice issue to stand out in sharp contrast to the contractual issue.

The grievance also raises the issue of whether Burditt could refuse to work under conditions he considered dangerous. In the grievance, Burditt denied refusing a direct order to go back to work, stating, "I was exposed to a hazard and I wasn't going back to work until I was checked out by the doctor."

Article 16, Section 2 of the collective-bargaining agreement states, "Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work, or danger to person or property or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or equipment."

The arbitral award specifically indicates that the grievance asserted rights under Article 16 of the collective-bargaining agreement. Therefore, I conclude that the contractual issues were factually parallel with the Complaint allegations concerning refusal to work under abnormally dangerous conditions.

The arbitral award includes a transcript of proceedings before the arbitral panel. This transcript clearly establishes that the panel received evidence regarding the facts relevant to resolving the unfair labor practice issue. In these circumstances, I find that the arbitral panel adequately considered the unfair labor practice issues in this case.

Additionally, after hearing the evidence presented by the government in the unfair labor practice case, I conclude that the panel reasonably could have determined that conditions were not abnormally dangerous on August 17, 1999. For example, testimony in this proceeding indicates that when the fire department representatives arrived on Respondent's premises on August 17, 1999, they did not find evidence of a chemical leakage. The next day, investigators did detect a chemical problem, but it is not clear from the evidence that the problem had been present the night before.

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Moreover, the Employer's business involves transportation of chemicals. It is not clear that the evidence supports a finding that the risk on this particular occasion was out of the ordinary, or presented an abnormally dangerous condition.

To summarize, in addition to showing that the arbitral panel adequately considered the unfair labor practice issues, the record also establishes that the arbitral proceeding was fair and regular. It also establishes that all parties agreed to be bound. Moreover, the record fails to demonstrate that the arbitral award was repugnant to the purposes and policies of the Act.

The General Counsel challenges the sufficiency of the arbitral award because it appears to base its denial of the grievance on a misunderstanding of the facts. Specifically, the arbitral award states:

> THE DECISION ON CASE NUMBER 61 IS BASED ON THE FACTS THAT K. BURDITT SHOULD HAVE GIVEN THE BILLS TO HIS SUPERVISOR, PER ARTICLE 16, SECTION 8, AND THE NMFA HEALTH AND SAFETY EMPLOYEE PROTECTION TRAINING PROGRAM.

This wording can certainly be interpreted in more than one way. On the one hand, it could suggest that the arbitral panel

believed that Respondent had discharged Burditt because he failed to give his supervisor certain requested documents.

However, I believe that such a reading of the arbitral award would be too narrow, and would ignore the central point. In essence, the arbitral panel concluded that Burditt had received proper discipline for failing to follow the safety procedures established in the collective-bargaining agreement and in a safety program established by that agreement.

The record contains considerable evidence to support a finding that Burditt did not follow the established safety program but instead acted contrary to the procedures established under the collective-bargaining agreement. Moreover, the panel specifically approved of the amount of discipline, a 6-day suspension, which Burditt received.

Therefore, I cannot conclude that the arbitral panel failed to consider or acted in disregard of the evidence. Although the panel did not articulate its findings very clearly, it seems clear that it considered the evidence carefully and came to a measured conclusion.

Moreover, the arbitral panel's finding that Respondent disciplined Burditt for failing to follow the contractual safety procedures indicates a rejection of the argument that Respondent imposed the discipline because of Burditt's protected activities. Stated another way, the panel's finding is tantamount to a conclusion that Respondent had a legitimate and substantial business justification for the discipline it took. Such a conclusion would not be repugnant to the Board's analytical process under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

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The arbitrator need not specifically state that he addressed the unfair labor practice issue, nor need his award read expressly in terms of the statutory standard, nor be totally consistent with Board law, but it must be susceptible to an interpretation consistent with the Act. See *The Hertz Corporation*, 326 NLRB No. 96 (September 24, 1998), citing *Motor Convoy, Inc.*, 303 NLRB 135-137 (1991). See also *Derr & Gruenwald Construction Co.*, 315 NLRB 266 (1994).

The General Counsel has cited *110 Greenwich Street Corp.*, 319 NLRB 331 (1995). However, I believe this decision involves an arbitration award which cannot be found consistent with the Act under any possible interpretation of it. Therefore, I conclude that this case should be distinguished.

In sum, I conclude that it is appropriate for the Board to defer to arbitration under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). Therefore, I recommend that the Complaint in this matter be dismissed.

After the court reporter has prepared the transcript in this matter, I will issue a Certification of Bench Decision to which will be attached, as an appendix, the portion of the transcript reporting the bench decision which I have just issued. When this certification is served on the parties, the time for filing exceptions will begin to run.

I appreciate the professionalism and civility of counsel. The hearing is closed.